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Office of Administrative Law Judges
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Issue date: 01Mar2002

CASE NUMBERS: 1999-LHC-2886
1999-LHC-2887
1999-LHC-2888

OWCP NUMBERS: 18-48376
18-65562
18-68931

In the Matter of :

JACK T. MORRISON,
Claimant,

v.

POOL CALIFORNIA ENERGY SERVICES, and **PRIDE PETROLEUM SERVICES**,
Employers,

and

SIGNAL MUTUAL INDEMNITY ASS'N,
Insurer.

Appearances

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Before: **Paul A. Mapes**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case involves a series of claims under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, (hereinafter referred to as "the Longshore Act" or "the Act")

and as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-1333 (hereinafter referred to as "the OCSLA"). A trial on the merits of these claims was held in Long Beach, California, on June 6 and 7, 2001.[1] All parties except the Director were represented by counsel and the following exhibits were admitted into evidence: Claimant's Exhibits (CX) 1 to 3, Self-Insured Pride Petroleum Exhibits (PRX) 1-26, Signal Mutual Exhibits (SMX)1-21, and Pool California Energy Services Exhibits (PCX) 1-20. In addition, the parties have submitted into evidence the post-trial depositions of two physicians: Dr. James T. London and Dr. David Heskiaoff. PCX 21 (deposition of Dr. London), SMX 22 (deposition of Dr. Heskiaoff). All parties except the Director and the claimant filed timely post-trial briefs.

BACKGROUND

Jack Morrison (hereinafter "the claimant") was born on February 24, 1945 and graduated from high school in 1963. Immediately after graduating from high school, he began working in the oil production industry. Tr. at 134. In May of 1990 he was hired by Pool California Energy Services (hereinafter "Pool") to work as a rig supervisor on an offshore oil drilling platform known as Platform Gina. Tr. at 106, 134,175. While the claimant was working on Platform Gina on July 20, 1990, a large piece of equipment known as a "rig" rolled back and pinned him against a guard rail. PCX 14 at 449, Tr. at 107-110, 290. As the claimant recalls, the rig pushed his lower back "right about" his waistline and forced his lower stomach against the guardrail. SMX 16 at 144. According to the claimant, he immediately felt pain in his lower back and numbness in his left leg, but was able to free himself and to continue working the rest of his shift. Tr. at 109 -110, 176. About three weeks after the injury, the claimant testified, he told his supervisor that his condition had not improved and the supervisor took him to an unnamed medical center. Tr. at 110. The claimant also received some treatment from a chiropractor and later sought treatment from Dr. Sandra Gerbitz at Harbor Medical Center in Ventura, California. Tr. at 310, PCX 12 at 376-85.

On January 16, 1991, the claimant signed a "First Report of Injury" concerning his July 20, 1990 injury. PCX 15 at 449. Statements in the form asserted that the claimant "did not request medical treatment at the time of the accident" and that no Pool injury report was filed.

On or about February 1, 1991, the claimant began working for Pride Petroleum Services (hereinafter "Pride") as an operations manager. Tr. at 138, 141, 175-77. Among other things, the claimant's job duties as an operations manager required him to oversee Pride's offshore and land-based "production rigs." Tr. at 121. As a result, he was required to do "a lot of driving," walk over un-level surfaces, climb stairs, and travel to offshore oil drilling platforms about once every two or three weeks for safety meetings. Tr. at 121, 127, 138. The offshore platforms he visited after February 1, 1991 included

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1. Papers submitted by the claimant prior to the trial asserted that he had suffered work-related injuries to his heart and cardiovascular system while employed by the defendants. However, during the trial he withdrew without prejudice any claim for such alleged injuries. Tr. at 34. Apparently, a formal claim for such injuries has been filed under the State of California's workers' compensation statute, but not under the Longshore Act. Tr. at 8.

Platform Gail, Platform Hogan, Platform Houchin, Platform Gilda, Platform Habitat, and Platform Henry. Tr. at 143, 160, 169-70, 172, 201, 407, 409. According to Department of Interior records, all six of these platforms are located on the outer continental shelf. PCX 20.

On February 4, 1991, the claimant underwent an MRI of his lumbar spine. Among other things, the MRI indicated that there was a 3 to 4 millimeter disc herniation at L5-S1 that was minimally displacing the left S1 nerve root. PCX 5 at 130.

On February 19, 1991, the claimant provided Pride a letter in which he represented that he suffered a back injury while working for Pool but did not believe his back condition would interfere with the performance of his new job or that his new job duties would worsen his condtion. SMX 11, PCX 14. During the trial, the claimant testified that he now believes those statements were mistaken. Tr. at 230.

On April 19, 1991, the claimant was examined by Dr. Moustapha Abou-Samra, who is board certified in neurological surgery. PRX 22 at 215-17, Tr. at 111. In a report to Dr. Gerbitz, Dr. Abou-Samra noted that the February 4, 1991 MRI had shown a disc herniation at L5-S1 and that the claimant had symptoms of an S-1 radiculopathy. He concluded that the claimant would probably need surgery on his lumbar spine, but recommended that he first undergo a CT scan and have x-rays taken of his hips.

On April 30, 1991, x-rays were taken of the the claimant's hips and interpreted as showing signs that the claimant had experienced slipped epiphysis during childhood. PRX 9 at 51, SMX 10 at 79. The x-rays, however, failed to reveal evidence of any acute fracture, dislocation, or subluxation. PCX 9 at 316. On the same day, the claimant underwent a CT scan of his lumbar spine. PCX 9 at 315. The results were interpreted as showing a moderate left-side disc herniation at L4-5.[2] *Id.*

On June 10, 1991, Dr. Abou-Samra performed a microdiskectomy at level L5-S1 of the claimant's spine. Tr. at 112, PRX 9 at 45. About six to eight weeks later the claimant went back to work at Pride without any restrictions, except a warning to be careful when lifting and to not drive more than two hours without stopping to stretch his back. Tr. at 112-13. While recovering from the surgery, the claimant was paid Longshore Act benefits by Pool. PCX 3, Tr. at 311.

On July 11, 1991, an attorney representing the claimant filed a formal claim under the OCSLA for injuries that the claimant allegedly suffered to his back and left hand during the July 20, 1990 accident. PCX 2 at 6. The claim did not make any reference to any alleged injury to the claimant's hips.

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2. However, subsequent medical reports indicate that the radiologist's statement that the herniation was at L4-5 was in error of nomenclature and that the herniation was actually at L5-S1. PCX 9 at 317-19.

On December 13, 1991, the claimant was examined by Dr. John V. Hill, an orthopedic surgeon. PCX 5 at 35-37, Tr. at 212. According to Dr. Hill's report, the claimant had obtained "significant relief" from his back symptoms after recovering from the surgery performed by Dr. Abou-Samra, but had begun to experience bilateral hip pain. Dr. Hill further reported that x-rays taken at the time of the claimant's visit showed bilateral degenerative arthritis with "significant joint space narrowing on the weightbearing dome with essentially bone on bone contact on the right side." Dr. Hill recommended conservative treatment for the time being, but predicted that the claimant would eventually need total hip replacement surgery in each hip. In his report, Dr. Hill also noted that the claimant's July 20, 1990 injury "could have been an aggravating factor in the genesis" of the claimant's symptoms, but then concluded that the underlying condition "was probably a pre-existing problem." In addition, Dr. Hill recommended that the claimant refrain from activities which require "significant impact, heavy lifting, squatting, etc."

According to the claimant's testimony, both before and after he saw Dr. Hill, he engaged in a variety of activities as operations manager for Pride that were inconsistent with Dr. Hill's recommendation to avoid activities involving significant impacts, heavy lifting, or squatting. For example, the claimant testified, whenever he went to an offshore platform other than Platform Gina it was necessary for him to "swing" on a rope in order to get between a boat and the platform's lowest level. Tr. at 166-67. According to the claimant's testimony, after swinging on the rope, he would land feet first on the platforms and experience increased pain in his lower back and hips. Tr. at 166-67. His back and hip pain also increased on offshore platforms, he testified, when he worked in awkward positions, climbed on equipment, or lifted tools. Tr. at 149-51. The claimant further recalled that offshore platform work required him to ascend and descend approximately 100 feet of stairs and he characterized the pain that he felt in his hips when climbing the stairs as being the "greatest" of all the categories of pain that he experienced during the performance of his job. Tr. at 121-22, 146. For these reasons, he testified, he "double dosed" on his pain medication whenever he was on an offshore platform. Tr. at 152.

In December of 1991, the claimant suffered a heart attack and in February of 1992 had coronary artery by-pass surgery. CX 2. After recovering from the surgery, he returned to his job as an operations manager for Pride. CX 2, SMX 12 at 96.

On February 11, 1993, the claimant was examined by Dr. P. Douglas Kiester, a board-certified orthopedic surgeon. PCX 10 at 339. In his report of February 12, 1993, Dr. Kiester set forth the claimant's description of his July 20, 1990 injury and an account of the treatment provided for that injury. In addition, Dr. Kiester described the results of his physical examination of the claimant and gave the following opinions: (1) that he is not sure the claimant actually had a herniated disc, (2) that he is unconvinced that the claimant's surgery "significantly affected his symptomotolgy," (3) that it is questionable whether the events that occurred during the July 20, 1990 accident could have caused a herniated disc, (4) that the claimant's neurological deficits appear to be real, (5) that it is "more probable" that the claimant's neurological deficits are not the result of the July 20, 1990 injury, and (6) that the claimant's hip impairment is secondary to degenerative arthritis and is not due to a single traumatic incident. Accompanying Dr.

Kiester's report was a separate four-page letter summarizing various records concerning the treatment the claimant received following the July 20, 1990 injury. PCX at 340-43.

On April 16, 1993, Dr. Philip R. Van Pelt issued a report in which he opined that the claimant's July 20, 1990 injury caused a disc rupture in the claimant's lumbar spine. SMX 14 at 118. Dr. Van Pelt also disagreed with Dr. Kiester's opinion that the July 1990 injury could not have caused a ruptured disc. *Id.*

On May 10, 1993, the claimant was examined at Pool's request by Dr. James T. London, a board-certified orthopedic surgeon. PRX 9. In a report dated July 6, 1993, Dr. London set forth the results of his physical examination, summarized the records of the claimant's prior orthopedic treatment, and expressed the following opinions: (1) that the claimant's July 20, 1990 injury caused a disc herniation at L5-S1, (2) that the claimant's back injury had become permanent and stationary, (3) that the claimant had longstanding degenerative arthritis in his hips, (4) that the claimant did not sustain any injury to his hips during the July 20, 1990 accident, and (5) that the claimant was capable of returning to his usual and customary work.

On April 1, 1994, Pride ceased being self insured for claims under the Longshore Act and began receiving Longshore Act coverage from Signal Mutual.

On April 6, 1995, one of the claimant's attorneys sent Dr. Abou-Samra a letter asking if the claimant's July 20, 1990 injury at Pool caused, aggravated, or accelerated the claimant's hip problems. SMX 14 at 112. In a reply dated April 10, 1995, Dr. Abou-Samra indicated that he is "not an expert in hip problems" and therefore declined to offer an opinion. SMX 14 at113.

On June 27, 1995, the claimant called Dr. Abou-Samra's office and left a message asking that he be referred to an orthopedic surgeon for treatment for his hip condition. SMX 14 at 115. In response, Dr. Abou-Samra apparently decided to refer the claimant to Dr. Thomas Golden, a board-certified orthopedic surgeon. *Id.* However, on June 30, 1995 someone named "Suzi" called Dr. Abou-Samra's office and reported that an unnamed "industrial carrier" had declined to approve a referral to Dr. Golden because the carrier had a medical report concluding the claimant's hip condition was not due to his 1990 injury. SMX 14 at 114.

On September 27, 1995, the claimant was again examined by Dr. London. PCX 6 at 239-42. In an October 4, 1995 report, Dr. London described the claimant's physical complaints, summarized the claimant's most recent medical records, set forth the results of his orthopedic examination of the claimant, and noted that an x-ray of the claimant's hips showed "severe arthritic changes" that were indicative of avascular necrosis. In addition, Dr. London opined that the July 20, 1990 accident did not aggravate or worsen the claimant's hip pathology and agreed with Dr. Hill's opinion that the claimant's hip problem existed prior to his July 20, 1990 injury.

On October 22, 1996, the claimant was seen for the first time by Dr. Golden. SMX 14 at 111, PRX 21 at 213, PCX 11 at 348-75. By that time, the claimant testified, his hip pain was at level ten on a ten-point pain scale and he was waddling when he walked. Tr. at 225. According to Dr. Golden's report of the visit, contemporaneous x-rays showed "severe" secondary osteoarthritic changes that were probably due to bilateral avascular necrosis. Dr. Golden concluded that the claimant was a candidate for hip replacement surgery. Because the claimant told Dr. Golden that he attributed the condition to his 1990 work injury at Pool, Dr. Golden indicated that the claimant was "to submit this as an industrial accident."

The claimant's last day of work for Pride was January 7, 1997. PRX 23 at 233. The following day, Dr. Golden performed total hip replacement surgery on the claimant's left hip, and, on February 13, 2001, he performed an identical procedure on the claimant's right hip. PCX 11 at 349-50, 359-60. In the "finding/indications" sections of both operative reports, Dr. Golden indicated that the claimant's condition was the result of "severe ostenonecrosis of both femoral heads." PCX 11 at 349.

On an undetermined day sometime between the claimant's January 8, 1997 surgery and his February 13, 1997 surgery, the claimant and Dr. Golden completed an application for disability benefits under an insurance policy issued by Hartford Life and Accident Insurance Company. SMX 15 at 122. In a portion of that application, Dr. Golden responded to a question asking if the claimant's disability was work related by checking a box marked "yes." SMX 15 at 122. In the same form, Dr. Golden described the claimant's diagnosis as "severe osteoarthritis" that was "secondary to probable avascular necrosis." He also indicated that the "onset" of the condition occurred on July 21, 1990. *Id.* In addition to seeking disability insurance benefits from Hartford Life and Accident Insurance Company, on February 28, 1997 the claimant made a claim for benefits under a disability insurance program administered by the State of California's Employment Development Department. SMX 15 at 121. When filling out the claim form, he answered "no" to a question asking if his disability was caused by his work. *Id.* This claim was accompanied by another form signed by Dr. Golden. SMX 15 at 120. In that form, Dr. Golden responded to a question which asked if the disability was work-related by answering "no" and writing "has not been determined—workers' comp injury 1990." PCX 11 at 351. After these forms were reviewed by state officials, the claim was approved and the claimant received disability benefits of $336 per week for about a year. Tr. at 269-70, 319-20.

On April 11, 1997, Pride ceased paying wages to the claimant and placed him on a medical leave of absence. PRX 23 at 233. During the following month, the claimant was discharged from his employment at Pride because of his "medical disabilities." SMX 13 at 105.

On May 25, 1997, the claimant signed an Office of Workers' Compensation Programs' claim form alleging that his hip impairment was compensable under the Longshore Act and that the impairment was attributable to cumulative trauma that commenced on July 21, 1990 and did not end until January 7, 1997. SMX 1, PRX 1. In the "Nature of Injury" section of the claim form, someone wrote the words "back & both hips," but crossed out the word "back" before submitting the form to the Office of Workers'

Compensation Programs. *Id.* The only employer listed on the form was Pride. *Id.* On June 16, 1997, the OWCP sent a copy of the claim form to Pride and to Crawford and Company, but apparently did not send a copy of the claim to Signal Mutual. PRX 2. A copy of the claim form was apparently received by Pride's corporate successor, Dawson Production Services, by June 20, 1997. PRX 2 at 5 (copy of the claim form bearing the following fax machine markings: "June 20-97 08:12A Dawson Production SVCS"). On July 16, 1997, Liberty Mutual Insurance Company filed a notice controverting the claim on the grounds that it did not provide Longshore Act coverage for Pride. PRX 3.

On November 10, 1997, the claimant was again examined by Dr. London. PCX 6 at 235-38. In his report of December 2, 1997, Dr. London set forth the claimant's description of his current symptoms and described the results of his examination. In addition, Dr. London offered the following opinions: (1) that the claimant's July 20, 1990 injury caused a disc herniation at L5-S1, (2) that the back impairment attributable to the claimant's July 1990 injury had become permanent and stationary, (3) that the back impairment does not preclude the claimant from performing his usual and customary work, (4) that the claimant's hip condition was not aggravated by or related to the July 20, 1990 injury, (5) that the claimant's hip condition had reached the point of maximum medical improvement, and (6) that the hip condition warrants prophylactic restrictions against prolonged walking or standing, repeated bending, squatting or working in awkward positions, repeated climbing, or impact loading such as jumping or running.

On November 19, 1997, an attorney representing Pride filed a notice controverting the claimant's May 25, 1997 claim for benefits. PRX 4.

At the request of Pool's insurance adjuster, the claimant was examined on April 14, 1998 by Dr. Paul J. Grodan, who is board-certified in internal medicine and cardiology. SMX 8. Among other things, Dr. Grodan's report asserted: (1) that the July 20, 1990 injury did not cause any direct trauma to the claimant's hips, (2) that it is extremely unlikely that either the claimant's employment by Pool or Pride could have caused or aggravated any hip problems, (3) that the claimant's hip replacement surgery was "a direct result of his sports activities in the past and not due to his employment," (4) that the claimant's condition was permanent and stationary, and (5) that the claimant has impairments that preclude him from "heavy" work and work that involves undue emotional stress and strain. However, Dr. Grodan's report also indicated that he wished to "defer the orthopedic aspects" of the claimant's case "to appropriate specialists."

On April 17, 1998, the claimant was examined at his attorney's request by Dr. Steven Nagelberg, a board-certified orthopedic surgeon. CX 1. Dr. Nagelberg's report set forth the results of the examination and a summary of the claimant's medical and vocational history. In the report's conclusion, Dr. Nagelberg opined: (1) that the claimant's condition had become permanent and stationary, (2) that the claimant's hip impairment limited him to "semi-sedentary work," (3) that his back impairment precluded "heavy work" as well as prolonged sitting and standing, (4) that the claimant cannot return to "oil rig work" or to work as an oil rig supervisor, (5) that the claimant's July 20, 1990 injury at Pool was responsible for 90 percent of the claimant's lumbar impairment, but that the remaining 10 percent of the impairment was

attributable to cumulative trauma that occurred while working for both Pool and Pride, and (6) that the claimant's hip impairment is attributable to cumulative trauma which occurred over the entire period that the claimant was employed by Pool and Pride.

On July 10, 1998, the claimant was again examined by Dr. Abou-Samra. PCX 5 at 132. According to Dr. Abou-Samra's report, the claimant was "doing well" and his lower back condition was permanent and stationary. Dr. Abou-Samra further noted that he had reviewed the report of Dr. Nagelberg and was in agreement with his conclusions concerning the claimant's back problem. He added, however, that he had "no expertise" concerning the treatment of hips and would therefore not comment concerning Dr. Nagelberg's conclusions about the claimant's hip impairment.

In a report dated July 23, 1998, Dr. London set forth a summary of Dr. Grodan's report of April 18, 1998 and other medical records. PCX 6 at 230-34. In addition, Dr. London noted that he agreed with Dr. Grodan's opinions.

On October 6, 1998, the claimant was examined by Dr. James L. Strait, a board-certified orthopedic surgeon. SMX 7. Dr. Strait's report set forth the results of his examination and a summary of the claimant's vocational and medical history. Dr. Strait's report concluded: (1) that there is no evidence of cumulative trauma to the claimant's back and that his entire back impairment is therefore solely attributable to the July 20, 1990 injury, (2) that although 80 percent of the claimant's hip impairment is not work-related, approximately 20 percent of the impairment is attributable to cumulative trauma which he suffered while working for both Pool and Pride, (3) that the claimant's back condition became permanent and stationary one year after his low back surgery, (4) that the claimant's hip impairment became permanent and stationary six months after his second hip surgery, (5) that the claimant's back condition precludes him from performing "heavy" work, (6) that the claimant's hip impairment precludes him from running and jumping, and (7) that the claimant's impairments preclude him from returning to his former jobs.

On November 2, 1998, the claimant was again examined by Dr. London. PCX at 221-29. In a report issued on December 7, 1998, Dr. London described the results of his examination of the claimant, summarized the claimant's medical records for the period between October 22, 1996 and October 6, 1998, and stated the following opinions: (1) that the claimant's July 20, 1990 injury caused a herniated disc at L5-S1, (2) that the claimant's back impairment is stationary, (3) that the claimant's hip impairment is unrelated to the July 20, 1990 injury, (4) that the claimant's back impairment precludes him from work that involves lifting, carrying, or pushing or pulling loads over 50 pounds, and (5) that the claimant's hip impairment precludes him from prolonged walking or standing, repeated bending, squatting, or working in awkward positions, repeated climbing, or impact loading such as jumping or running.

At some unspecified date in June of 1999, Signal Mutual first received notice that the claimant was seeking benefits under the OCSLA for alleged cumulative trauma to his hips while employed by Pride. Tr. at 446 (testimony of Ed Martin).

On February 11, 2000, the claimant was examined by Dr. David Heskiaoff, a board-certified orthopedic surgeon. SMX 10. In his report, Dr. Heskiaoff set forth the results of his examination and summarized the claimant's medical history. Dr. Heskiaoff's report also contained the following opinions: (1) that adults who experienced slipped capital femoral epiphyses as children generally develop osteoarthritic conditions in their hips and have to have total hip replacement surgeries during their 30's, 40's or 50's, (2) that for this reason, even if the claimant had not worked for Pool and Pride he would have still needed total hip replacement surgery, (3) that the claimant's hip replacement surgery was "solely due to the natural progression" of the claimant's childhood condition, (4) that the claimant's work activities did not accelerate or hasten the need for either of the claimant's hip replacement surgeries, (5) that the claimant's work activities at Pride "did not accelerate, aggravate or in any way contribute to any increased level or frequency of his back symptoms," (6) that the claimant did not experience any "continuous trauma" to his lumbar spine while employed by either Pool or Pride, (7) that the claimant's back condition is permanent and stationary, (8) that the claimant's back impairment is due solely to his July 1990 injury, (9) that the back impairment precludes him from performing "heavy" work, (10) that the claimant's back condition became permanent and stationary "in 1993," (11) that the claimant's hip impairment precludes him from lifting items weighing more than 15 pounds and from squatting, kneeling or climbing, and (12) that the claimant's hip impairment became permanent and stationary six months after the hip surgery was performed.

On July 21, 2000, the claimant was examined again by Dr. London. PCX 6 at 214-20. In his report of July 25, 2000, Dr. London set forth the results of his examination and a summary Dr. Hesikiaoff's report of February 11, 2000. At the end of the report, Dr. London opined: (1) that the claimant's July 20, 1990 injury became permanent and stationary on September 8, 1991, (2) that the back impairment resulting from that injury precludes the claimant from engaging in work that involves heavy lifting or carrying and pushing or pulling loads over 50 pounds on a repetitive basis, (3) that these restrictions do not preclude the claimant from performing his former job as a rig supervisor, (4) that the claimant did not sustain an injury to his hips during the July 20, 1991 injury, (5) that the claimant did not sustain any cumulative trauma to his low back or hips while employed by Pool, (6) that the claimant's work for Pool did not aggravate or worsen his hip condition, (7) that although the claimant's work for Pride might have "exacerbated" his hip symptoms, this work did not aggravate or permanently worsen the underlying degenerative condition, and (8) that no further medical treatment is needed for the July 20, 1990 injury.

On July 24, 2000, the claimant was examined for a second time by Dr. Grodan. PCX 7. In a report dated August 17, 2000, Dr. Grodan summarized the claimant's medical and vocational history, set forth the results of his physical examination of the claimant, summarized the claimant's deposition of May 18, 2000, and described reports by Dr. Heskiaoff, Dr. Luros and Dr. Abou-Samra. In addition, Dr. Grodan set forth various opinions on the question of whether the claimant's cardiovascular condition was in any way work related.

On July 26, 2000, the claimant was examined at Pride's request by Dr. Richard M. Hyman, a specialist in internal medicine and cardiology. SMX 12. In his report of August 1, 2000, Dr. Hyman set

forth a description of the claimant's work history, summarized some medical records and lab test results, and described his findings from a brief physical examination. In the report's conclusion, Dr. Hyman discussed the claimant's cardiac condition in detail and concluded that it was unrelated to his employment. He also concluded that because the claimant's job at Pride was "primarily supervisory," his hip and back conditions were unrelated to his employment at Pride.

According to the claimant's trial testimony, he did not suffer any specific injury while working for Pride and lost no work time because of his back conditon. Tr. at 234, 237. The claimant has also acknowledged that he no longer suffers from pain in his hips, that his back condition has "pretty much" remained the same, and that the only medicine he now takes is a daily aspirin for his heart. Tr. at 226, 249. The claimant has not returned to any type of work since recovering from his hip surgeries, but acknowledged that he probably could do some kind of job if he were allowed to occasionally move around and not required to sit down for prolonged periods of time. Tr. at 131-32.

ANALYSIS

The parties have stipulated that: (1) the claimant sustained an injury to his back and left hand while employed by Pool on July 20, 1990, (2) that the July 20, 1990 injury occurred on a situs covered by the provisions of the OCSLA, (3) that all alleged injuries occurred at a time when there was an employer-employee relationship, (4) that the claimant's average weekly wage for any injury occurring during the period Pride was self insured was $980.77, and (5) that, if Signal Mutual is found to be responsible for the payment of benefits, the claimant cannot return to his former job. Tr. at 74. In addition, all parties except Pool have stipulated that the claimant's average weekly wage during all periods when Pride was insured by Signal Mutual was $1,015.38. All three of the defendants have also stipulated that Signal Mutual provided Longshore Act insurance coverage to Pride from April 1, 1994 until the claimant's last date of employment at Pride.

The primary issue in dispute is the question of which defendant employer, if any, is responsible for paying Longshore Act benefits for the claimant's alleged hip and back injuries.

If it is determined that Pool is the last responsible employer for either alleged injury, there are also disputes concerning the claimant's average weekly wage, the nature and extent of his disability, the date of maximum medical improvement, the timeliness of his notice of injury under section 12, and Pool's entitlement to Special Fund relief.

Alternatively, if it is determined that Pride is the last responsible employer for either alleged injury, there are issues concerning: the applicability of the doctrine of judicial estoppel, jurisdiction under the OCSLA, the timeliness under section 13 of the claim against Pride for the alleged back injury, the timeliness under section 12 of the notice of the claimant's alleged back and hip injuries, the date of maximum medical improvement of each compensable injury, the extent of the claimant's disability, Pride's entitlement to Special Fund relief, and Pride's entitlement to a credit for wages the claimant received after his last day

of work for Pride. In addition, if it is determined that Pride is the employer responsible for paying benefits for the claimant's back impairment, there is a dispute concerning Pride's obligation to reimburse Pool for benefits it paid as a result of the claimant's back injury.

1. Employer Responsible for the Alleged Injuries to the Claimant's Hips and Back

Under the Longshore Act's so-called "last responsible employer rule" a single employer can be held liable for the totality of an injured worker's disability, even though the disability may be attributable to a series of injuries that the worker suffered while working for different employers. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978). The rule is designed to avoid the expense and complications that would be inherent in any effort to apportion liability among employers according to their individual contributions to a worker's disability. *Id.* at 1336; *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1955). However, the last employer rule does not necessarily mean that the last employer to have exposed an injured worker to potentially harmful working conditions is always responsible for the payment of benefits. In fact, when applying the last employer rule, the Ninth Circuit has utilized two distinct tests to determine which of an injured worker's employers will be held liable for all of the worker's disability. The first test applies in cases involving disabilities that are categorized as occupational diseases and the second test applies in cases involving disabilities that are the result of multiple or cumulative traumas. *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 623-24 (9th Cir. 1991). Under the rule which applies in occupational disease cases, the responsible employer is the employer which last exposed the worker to potentially injurious stimuli prior to the date upon which the worker became aware that he or she was suffering from an occupational disease arising from his or her employment. *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 840-41 (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986). Under this rule, it is unnecessary to show that there was an actual causal relationship between the potentially injurious stimuli and the claimant's impairment, so long as it is at least theoretically possible for the potentially injurious stimuli to have contributed to the impairment. 932 F.2d at 840-41. In contrast, under the rule which applies in traumatic injury cases, the identity of the responsible employer depends upon the actual cause of the worker's ultimate disability. On one hand, if the worker's ultimate disability is the result of the natural progression of a traumatic injury and would have occurred notwithstanding the subsequent injury or injuries, the employer that employed the worker on the date of the initial injury is the responsible employer. On the other hand, if the worker's ultimate disability is at least partially the result of a new traumatic injury that aggravated, accelerated, or combined with a prior injury to create the disability, the employer that employed the worker at the time of the new injury is the responsible employer. *Foundation Constructors, supra*, at 624.

In this case, the claimant is alleging that his hip and back conditions were either caused or worsened by work-related cumulative trauma that began as early as 1990. Thus, because the claimant's disabilities

allegedly arise from cumulative traumatic injuries rather than from any sort of alleged occupational disease,[3] the responsible employer is the employer which, according to the preponderance of the evidence, last subjected the claimant to trauma that actually combined with, aggravated, or accelerated his hip and back impairments.[4]

In this regard, it is noted that insofar as the claimant contends that he suffered work-related injuries, he is aided by the provisions of subsection 20(a) of the Longshore Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary---(a) that the claim comes within the provisions of the Act...." In order to use this presumption to show a causal relationship between a claimant's job and his or her impairment, a claimant must produce evidence indicating that he or she suffered some harm or pain *and* that working conditions existed or an accident occurred that could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (1981). Thus, the presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982). However, only "*some* evidence tending to establish" both prerequisites is required and it is not necessary to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990)(emphasis in original). Once the subsection 20(a) presumption has been properly invoked, the relevant employer is given the burden of presenting "substantial evidence" to counter the presumed relationship between the claimant's impairment

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3. The generally accepted definition of an occupational disease is "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree in comparison with employment generally." *Port of Portland v. Director, OWCP*, 192 F.3d 933, 939 (9th Cir. 1999) (noting, *inter alia*, that walking is not an activity particular to work of a longshoreman). *See also Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 176 (2nd Cir. 1989) (citing 1B Larson, *The Law of Workmen's Compensation* §41.00 at 7-353); *Steed v. Container Stevedoring Company*, 25 BRBS 210, 215 n. 2 (1991). Although a few state courts have held that cumulative trauma is a type of occupational disease, the Ninth Circuit has a different view. For example, in *Foundation Constructors* the Ninth Circuit explicitly concluded that a back condition that resulted from repeatedly operating jackhammers and lifting 100-pound weights did not constitute an occupational disease. 950 F.2d at 624. Similarly, in *Kelaita* the Ninth Circuit upheld the Benefits Review Board's decision that cumulative trauma to a claimant's arm did not amount to an occupational disease. 799 F.2d at 1311-12.

4. It is also noted that under the so-called "aggravation rule," a claimant seeking benefits under the Longshore Act does not have to show that a work injury was the sole cause or even the principal cause of a disability. Rather, a claimant need only show that an employment-related injury aggravated, accelerated, or combined with a pre-existing impairment. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991). If a claimant is successful in making such a showing, his or her entire impairment is compensable. *Id.*

and its alleged cause.[5] If the presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant. *See also Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995). If the presumption is not rebutted with substantial evidence, a causal relationship between the worker's job and his or her impairment must be presumed. However, the subsection 20(a) presumption does not assist

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5. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). There is one court of appeals decision that appears to hold that medical testimony offered to rebut a subsection 20(a) presumption of causation is not sufficient to satisfy the requirements of the Act unless that testimony completely "rules out" any possible causal connection between a claimant's employment and the alleged disability. *See, e.g., Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 297 (11th Cir. 1990) (holding that the subsection 20(a) presumption was not rebutted because no physician had offered an opinion "ruling out a potential connection" between the claimant's medical condition and his employment). However, this standard has been applied only in the Eleventh Circuit and it has been explicitly rejected by both the First and Fifth Circuits. *Bath Iron Works v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997)(holding that an "employer need not rule out any possible causal relationship between the claimant's employment and his condition" because such a requirement "would go far beyond the substantial evidence standard set forth in the statute"); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999)("unequivocally" rejecting a "'ruling out' standard" and noting that the text of subsection 20(a) requires only "substantial evidence" to rebut the presumption). Moreover, the Fourth and Seventh Circuits have implicitly rejected a "ruling out" standard by issuing decisions holding that all it takes to rebut a subsection 20(a) presumption is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 817-18 (7th Cir. 1999); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 263 (4th Cir. 1997).

In this case, the claimant's alleged work injuries occurred in the Ninth Circuit, which has not yet considered the argument that subsection 20(a) requires an employer to provide evidence completely ruling out even a hypothetical possibility of a causal relationship. However, the Ninth Circuit's most recent decision concerning the application of subsection 20(a) suggests that if the issue were to be presented, this circuit would join with the First, Fourth, Fifth and Seventh Circuits in rejecting any such standard. In that decision, *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615 (9th Cir. 1999), the court did not in any way suggest that medical evidence that fails to completely "rule out" even the possibility of causation is in any way insufficient or equivocal. Rather, the court expressed agreement with the Benefits Review Board's observation that unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. Moreover, the BRB has recently held that medical opinions that are within a "reasonable degree of medical certainty" cannot be rejected as being "equivocal" just because such opinions do not "rule out" even the hypothetical possibility of a causal relationship. *O'Kelley v. Department of the Army/NAF*, 34 BRBS 39, 41-43 (2000).

claimants in proving that any disability resulting from a work injury was in fact permanent. *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979). Nor can the subsection 20(a) presumption be invoked by one employer against another in a case when there is a dispute concerning the identity of the responsible employer. *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999).

In considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). In fact, in the Ninth Circuit clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion." *Id.* In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician if the ALJ's decision sets forth "'specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" *Id.*

As the previously indicated, the claimant in this case has alleged that he suffers from two distinct impairments: a hip impairment and a back impairment. For this reason, each of these alleged impairments will be considered separately.

A. Hip Impairment

In brief, the claimant contends his hip impairment began as a result of his July 20, 1990 injury while working for Pool and that, as a result of his subsequent work for Pride on the outer continental shelf and elsewhere, the impairment was aggravated, accelerated, or otherwise worsened. The claimant thus asserts that Pride is the last responsible maritime employer.

To support his contention that his employment at Pride aggravated, accelerated, or otherwise worsened his hip impairment, the claimant seems to be relying on the previously described medical reports of Dr. Strait (SMX 7) and Dr. Nagelberg (CX 1). In addition, the claimant's contention that Pride is the last responsible maritime employer is also supported by the post-trial deposition testimony of Dr. London (PCX 21). In that testimony, Dr. London indicated that the claimant's trial testimony concerning the nature of his activities while working on offshore oil platforms has caused him to change his opinion on the question of whether the claimant's work activities at Pride caused any permanent aggravation of his hip condition and led him to now conclude that those work activities did in fact accelerate and permanently aggravate the claimant's hip impairment. PCX 21 at 45-49, 51-54, 79-81, 92-93, 97, 108-09, 146, 168.

I find that the foregoing opinions of Dr. Strait, Dr. Nagelberg, and Dr. London are sufficient to warrant invocation of a subsection 20(a) presumption that the claimant's hip impairment was at least aggravated or accelerated by cumulative incidents of work-related trauma.

Both Pride and Signal Mutual contend that the claimant did not suffer a work-related injury to his hips while employed by Pride. This contention is based primarily on the written reports of Dr. Grodan (SMX 8)and Dr. Hyman (SMX 12), and on the written report and deposition testimony of Dr. Heskiaoff (SMX 10 and SMX 22). In this regard, it is noted that during Dr. Heskiaoff's deposition he in effect opined that even though the claimant might have sometimes engaged in activities which were inconsistent with Dr. Hill's recommendations, these activities would not have affected the progression of his hip disease. SMX 22 at 36-37, 63, 78, 128. Pride and Signal Mutual also apparently rely on the claimant's testimony that he did not have any injuries at Pride after April 1, 1994 and that no "incident" occurred at Pride that caused his hip problems. PRX 24 at 263, 368.

I find that the opinions of Dr. Grodan, Dr. Hyman, and Dr. Heskiaoff are sufficient to rebut the subsection 20(a) presumption.

Because it has been determined that the presumption of causation has been rebutted, it is necessary to consider all of the relevant evidence to determine if a causal relationship between the claimant's hip impairment and his employment by Pride has been established by a preponderance of the evidence. After so considering the evidence, I conclude that a preponderance of the evidence indicates that cumulative trauma that the claimant experienced while working on oil platforms on the outer continental shelf did in fact aggravate, accelerate, or otherwise permanently worsen his hip impairments and that therefore Pride is the employer bearing responsibility under the Longshore Act for the claimant's hip impairment.[6] There are four reasons for this conclusion.

First, neither Dr. Grodan nor Dr. Hyman is a specialist in orthopedic medicine. Rather, both are specialists in internal medicine and therefore focused their examinations on the claimant's alleged cardiovascular injuries. For this reason, their opinions concerning the claimant's hip impairment are entitled to far less weight than the opinions of the orthopedic specialists who examined the claimant.

Second, although Dr. Hesikiaoff is an orthopedic surgeon and has particular expertise in the treatment of hip impairments, his opinion that the claimant's work activities at Pride did not accelerate or permanently aggravate his hip condition is less convincing than the contrary opinions of Dr. London, Dr. Strait, and Dr. Nagelberg. In this regard, it is recognized that the record contains an excerpt from a medical textbook which includes a statement indicating that "protected weight bearing" will have "no effect on the progression" of femoral head destruction in patients who have hip diseases like the claimant's.

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6. Because it has been concluded that the claimant's work for Pride permanently aggravated, accelerated or otherwise worsened the claimant's hip impairment, it is unnecessary to determine whether the claimant suffered any injury to his hips while employed by Pool.

PCX 21 at Attachment A. However, Dr. London testified that this statement means only that the progression of such diseases cannot be stopped by using crutches and persuasively explained that it would be medically incorrect to interpret the statement as suggesting that the progression of these diseases will not be accelerated by "impact loading." PCX 21 at 95-100. Moreover, Dr. London credibly testified that the kind of impact loading that occurred when the claimant used a rope to swing onto offshore platforms accelerated the deterioration of the cartilage in the claimant's hips. PCX 21 at 47-49 (testimony of Dr. London). It is also noted that even Dr. Heskiaoff declined to agree "100 percent" with the textbook excerpt which asserted that protected weight bearing will have no effect on the progression of femoral head destruction. SMX 22 at 30 (testimony of Dr. Heskiaoff).

Third, the opinions of the physicians who have concluded that the claimant's work at Pride contributed to his hip impairment are consistent with the medical advice of Dr. Hill, who, as a treating physician, admonished the claimant to avoid activities that involved significant impacts to his hips.

Fourth, although Dr. Golden's answers to the questions on the claimant's application for disability benefits from the State of California suggest that he did not think the claimant's hip condition was work related, he qualified that answer with a statement indicating that the relationship between the disability and the claimant's work "has not been determined." It is also noted that Dr. Golden responded "yes" to the same question on a form he filed out for Hartford Life and Accident Insurance Company.

B. Back Impairment

The claimant contends that his back impairment began as a result of his July 20, 1990 injury while working for Pool and that, as a result of his subsequent work for Pride on the outer continental shelf and elsewhere, the impairment was aggravated, accelerated, or otherwise worsened. Thus, the claimant asserts that Pride is also the last responsible maritime employer for his back impairment.

To support his contention that his employment by Pride aggravated, accelerated, or otherwise worsened his back impairment, the claimant apparently relies on the medical opinions of Dr. Nagelberg and Dr. Abou-Samra, who has expressed general agreement with Dr. Nagelberg's opinion concerning the claimant's back impairment. CX 1 (report of Dr. Nagelberg), PCX 5 at 132 (letter from Dr. Abou-Samra). In addition, the claimant's assertion concerning the aggravation and acceleration of his back impairment while employed by Pride is supported by Dr. London's post-trial deposition testimony. PCX 21 at 49-50, 55-56, 62, 64-65, 168-69.

I find that the foregoing opinions of Dr. Nagelberg, Dr. Abou-Samra, and Dr. London are sufficient to warrant invocation of a subsection 20(a) presumption that the claimant's back impairment was at least aggravated or accelerated by cumulative trauma which occurred while he was employed on the outer continental shelf by Pride.

Both Pride and Signal Mutual contend that the claimant did not suffer a work-related back injury while employed by Pride. This contention is based primarily on the testimony and written reports of three

physicians: Dr. Strait (SMX 7), Dr. Hyman (SMX 12), and Dr. Heskiaoff (SMX 10 and SMX 22 at 54, 104, 114, 124-25, 127-28).

I find that the opinions of Dr. Strait, Dr. Hyman, and Dr. Heskiaoff are sufficient to rebut the subsection 20(a) presumption. Accordingly, it is necessary to consider all of the relevant evidence to determine if a preponderance of the evidence indicates that the claimant's employment by Pride accelerated or permanently aggravated his pre-existing back impairment. After so considering the evidence, I conclude that the weight of the evidence indicates that cumulative trauma that the claimant experienced while working for Pride on oil platforms on the outer continental shelf between 1991 and 1997 did in fact aggravate, accelerate, or otherwise permanently worsen his back impairment. There are three reasons for this conclusion.

First, Dr. London's opinion that the claimant's back condition was aggravated by his work for Pride between 1991 and 1997 is more credible that the contrary opinions of Dr. Heskiaoff, Dr. Strait and Dr. Hyman. In this regard, it is noted that, unlike Dr. London, Dr. Strait and Dr. Hyman were apparently unaware that the claimant's job required him to swing on a rope to get onto offshore oil platforms. Moreover, even though Dr. Heskiaoff was aware of this aspect of the claimant's job duties, he did not adequately explain his reasons for concluding that the claimant's back condition would not have been aggravated by such activities. In contrast, Dr. London explained that the 1991 back surgery which removed the claimant's L5-S1 disc made the nerves and facet joints in the claimant's back more vulnerable to injury when the claimant engaged in the kind of "impact loading" that occurred when he used a rope to swing onto offshore oil platforms. Dr. London was also convincing in testifying that the claimant's work activities between February and June of 1991 aggravated his L5-S1 disc injury and thereby accelerated the need for the surgery that the claimant underwent in June of 1991.[7]

Second, the only one of the foregoing physicians who actually treated the claimant for his back impairment, Dr. Abou-Samra, has expressed general agreement with Dr. Nagelberg's conclusions concerning the claimant's back problem. PCX at 132. Among those conclusions is an opinion that approximately five percent of the claimant's back impairment is attributable to the claimant's employment by Pride prior to his April 30 CT scan.[8]

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7. In this regard it is noted that the claimant's testimony indicates that in addition to working on the outer continental shelf after his June 1991 back surgery, he also worked on the outer continental shelf for Pride during the four-month period prior to the back surgery. Tr. at 203-04.

8. It is noted that although Dr. Nagelberg's report seems to assume that the April 30, 1991 CT scan was the first objective evidence of the existence of a herniated disc, in fact, the first objective evidence of a herniation was the MRI the claimant underwent on February 4, 1991 MRI. This mistaken assumption, however, is not necessarily inconsistent with Dr. Nagelberg's conclusion that the claimant suffered continuing trauma while working for Pride and that the trauma aggravated the disc herniation that was initially caused by the claimant's July 1990 injury while working for Pool.

Third, although the claimant testified that his back condition has remained "basically the same" since he recovered from his 1991 surgery, he did acknowledge that there has been at least some worsening in his back condition during the period he worked for Pride. *See, e.g.*, Tr. at 114, 342-43 (claimant's testimony that his back remained basically the same since he recovered from the surgery on his lumbar spine), SMX 18 at 366 (claimant's May 18, 2000 deposition testimony that his back condition reached a plateau four to six months after his surgery and remained pretty much the same thereafter), Tr. at 117 (claimant's trial testimony that his back condition "got worse" after he recovered from his 1991 surgery), SMX 16 at 161 (claimant's March 18, 1998 deposition testimony that while working for Pride, his back condition "worsened" and he had more restrictions on his ability to lift).

2. Applicability of the Doctrine of Judicial Estoppel

As pointed out by Signal Mutual, the doctrine of judicial estoppel is a discretionary judicial power which, in the Ninth Circuit, is applicable to workers' compensation proceedings and can be applied in situations where a litigant is making factual representations that conflict with representations the litigant made in a prior action, even if the prior action was settled before any court or agency issued a judgment. *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996). Pride and Signal Mutual thus contend that even if the claimant did suffer compensable injuries to his hips and back while employed by Pride, he should be judicially estopped from claiming benefits for such injuries because his claim for such benefits is inconsistent with his representation to the State of California in March of 1997 that his hip impairment was not work-related.

In view of the *Rissetto* decision, it is clear that the doctrine of judicial estoppel can be properly invoked in cases involving the Longshore Act. It is also clear that the representations contained in the claimant's application for state disability benefits are directly inconsistent with the claimant's assertion in this case that his hip impairment is work related. However, it also appears that this inconsistency was not caused by any intentional desire to mislead, but was instead the result of understandable confusion. For that reason, I find, that it would be inappropriate to apply the doctrine of judicial estoppel in this case. *See Johnson v. Oregon*, 141 F.3d 1361, 1369 (9th Cir. 1998) (holding that "[i]f incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply"); *Fredenburg v. Contra Costa Dept of Health Services*, 172 F.3d 1176 (9th Cir. 1999)(holding that the doctrine should not be applied where a party was not "playing fast and loose with, or committing fraud, on the court"); *General Signal v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1505 (9th Cir. 1995) ("judicial estoppel 'is reserved for more egregious conduct than just 'threshhold' inconsistency'"); *Morris v. State of California*, 966 F.2d 448, 453-55 (9th Cir. 1991) (change of position justified by ineffective assistance of counsel in earlier litigation).

In this regard, it is recognized that by the time the claimant submitted his application to the State of California in February of 1997, he had apparently been told by both Dr. Abou-Samra and Dr. Hill that there could be a relationship between his 1990 injury and his hip impairment. Tr. at 111, 239, 273-74

(claimant's testimony that Dr. Abou Samra told him that he believed that the claimant's hip impairment was related to his July 1990 injury), PCX 5 at 35-37 (report of Dr. Hill). However, the record also indicates that by the time the claimant sought treatment from Dr. Golden in the fall of 1996, Dr. Abou-Samra had written a letter expressly declining to provide an opinion on the cause of the claimant's hip impairment and Dr. London had issued a report concluding that there was no relationship between the claimant's hip impairment and his employment at Pool. SMX 14 at 113 (letter from Dr. Abou-Samra), PRX 9 (report of Dr. London). It also appears that because of Dr. London's report, Pool's insurer had declined to agree to pay for the claimant's treatment by Dr. Golden. SMX 14 at 114 (memo to Dr. Abou-Samra). In addition, although Dr. Golden had indicated that the claimant's hip condition was work related in response to a question on a Hartford Life and Accident Insurance Company application for disability benefits, he answered "no" to the same question when he subsequently completed the physician's portion of the application the claimant submitted to the State of California. SMX 15 at 122 (Hartford Life and Accident Insurance Company application), PCX 11 at 351 (application for State of California disability benefits). Moreover, when the claimant submitted his disability application to the State of California in February of 1997, there was not one single medical report suggesting that the claimant's hip impairment was attributable to his work activities at Pride and the claimant had not yet made any claim against Pride for his hip impairment. Nor is there any evidence that the claimant had even been advised by an attorney concerning the possibility of making such a claim.

3. Jurisdiction under the OCSLA

In brief, the OCSLA provides that any worker who suffers a disability or death as a result of an injury occurring as the result of operations conducted on the outer continental shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer continental shelf shall be compensated under the provisions of the Longshore Act. 43 U.S.C. §1333(b). In this case, the claimant has alleged that his hip and back impairments are compensable under this provision and has provided evidence demonstrating that he suffered injuries while engaging in the type of activities described in the OCSLA. Nonetheless, both Pride and Signal Mutual argue that any claim against them must be denied on the grounds that the claimant has failed to establish that his claim for benefits falls within the jurisdiction of the OCSLA.[9] Their arguments, however, are not precisely the same.

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9. In this regard it is recognized that some of the cumulative trauma to the claimant's hips and back undoubtedly occurred on offshore oil rigs in navigable waters not covered by the OCSLA, i.e., on oil platforms located between the coast of the State of California and the outer continental shelf. For this reason, it might be argued that the claimant's injuries were directly subject to the provisions of the Longshore Act. However, it is well settled that the Longshore Act does not apply to offshore oilfield workers unless the injuries occurred in circumstances subject to the provisions of the OCSLA. *See Herb's Welding v. Gray*, 470 U.S. 414, 416, 421-23 (1984); *Munguia v. Director, OWCP*, 999 F.2d 808 (5th Cir. 1993); *Kerr v. Smith*, 896 F. Supp. 605 (E. D. La. 1995).

On one hand, Pride simply alleges without any explanation that the claimant has failed to show that any injury he suffered was at any time subject to the jurisdiction of the OCSLA. In view of the claimant's testimony and the other evidence supporting his claim, this argument is plainly meritless.

In contrast, Signal Mutual's argument is more sophisticated and focuses on establishing that the claimant has failed to show that he suffered any injury within the jurisdiction of the OCSLA during the period when Signal Mutual was providing OCSLA insurance coverage to Pride, i.e., during the period subsequent to March 31, 1994. In particular, Signal Mutual argues: (1) that there is no jurisdiction to award benefits under the OCSLA unless the claimant's injury occurred at an outer continental shelf "situs," (2) that the claimant's evidence has failed to establish by a preponderance of the evidence that any injury he suffered at a OCSLA "situs" occurred at a time subsequent to March 31, 1994, and (3) that the claimant cannot use the Longshore Act's subsection 20(a) presumption as a substitute for evidentiary proof that the "situs" requirement has been satisfied.

Review of the relevant judicial precedents indicates that the question of whether an OCSLA claimant must prove an injury on an OCSLA "situs" has not yet been addressed by Ninth Circuit and has resulted in conflicting precedents in the Third and Fifth Circuits. According to the Third Circuit, there is no "situs" requirement in the OCSLA and benefits can be paid under that act even if an injury occurs on a highway far removed from the outer continental shelf. *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3rd Cir. 1988). In contrast, the Fifth Circuit has issued a series of decisions which reject the Third's Circuit's reasoning and find that as a matter of law there is a "situs" requirement. *DeMette v. Falcon Drilling Co., Inc, ____F.3d ____ (5th Cir. 2002); Mills v. Director, OWCP*, 877 F.2d 356, 361-62 (5th Cir. 1989)*; Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 558 (5th Cir. 1998). Because these Fifth Circuit decisions are more consistent with the Supreme Court's decision in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 217-20 (1986), than the Third Circuit's decision in *Curtis*, I find that Signal Mutual is probably correct in contending that there is a "situs" requirement in the OCSLA.[10]

Signal Mutual is probably also correct in arguing that the claimant has failed to show by a preponderance of the evidence that he suffered an injury at an OCSLA situs after March 31, 1994. In this regard, it is noted that although the claimant did testify that he "probably" last worked on an outer continental shelf oil platform in 1995, he also acknowledged that any testimony that he could provide on the question of whether he worked on the outer continental shelf at any time after April 1, 1994 would just be a "guess." Tr. at 349-351, 410-12.

However, Signal Mutual is not correct in contending that the claimant cannot rely on subsection 20(a) to establish that his claim falls within the jurisdiction of the OCSLA. Indeed, in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), the Supreme Court explicitly cited subsection 20(a) of the

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10. In addition, it is also noted that a recent decision by the Benefits Review Board follows the rule adopted by the Fifth Circuit without in any way suggesting that it limits its application of that rule to cases arising in the Fifth Circuit. *See Martin v. Pride Offshore, Inc.*, 34 BRBS 192 (2001).

Longshore Act for the statement that, "jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary.'" *Id.* at 474. This interpretation of the Act has been applied by at least two federal circuits. For example, in *Edgerton v. Washington Metropolitan Area Transit Authority*, 925 F.2d 422 (D.C. Cir. 1990), the United States Court of Appeals for the District of Columbia relied on the Supreme Court's holding in *Cardillo* when it reversed a Benefits Review Board (BRB) decision upholding an ALJ's finding that a bus driver had failed to show that his work injury came within the jurisdiction of a statute extending Longshore Act coverage to workers in the District of Columbia.[11] In reversing the finding that jurisdiction had not been shown, the *Edgerton* Court pointed out that the ALJ had failed to recognize that under the provisions of subsection 20(a), "the burden of *disproving"* jurisdiction "rests on the party opposing the claim." *Id.* at 425 (emphasis in original). Similarly, the Fifth Circuit has also held that jurisdiction is presumed under subsection 20(a) of the Longshore Act. *Munguia v. Chevron U.S.A. Inc.*, 999 F.2d 808, n. 2 (5th Cir 1993) ('it should be noted that jurisdiction is presumed under the [Longshore] Act....The presumption is, of course, rebuttable, but the burden of establishing jurisdiction (or the lack thereof) does not lie with the claimant."). *See also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

It is recognized that the BRB's decision in *George v. Lucas Marine Construction*, 28 BRBS 230 (1994), explicitly holds that the subsection 20(a) presumption *cannot* be used to establish that a claim comes within the jurisdiction of the Longshore Act and that this decision was affirmed by the Ninth Circuit. *George v. Director, OWCP*, 86 F.3d 1162 (9th Cir. 1996). It thus might appear that the Ninth Circuit does not agree with the interpretation of subsection 20(a) adopted by the Supreme Court and followed by the Courts of Appeals in the District of Columbia and the Fifth Circuit. However, review of the unpublished text of Ninth Circuit's decision in *Lucas Marine* suggests just the opposite. In fact, the majority opinion in that case implicitly acknowledges that subsection 20(a) *does* create a presumption of jurisdiction and indicates that the BRB's decision was being affirmed only because the record contained "substantial evidence" to rebut the presumption. *See* 1996 WL 287258 (9th Cir.)(text of unpublished decision). It is also noted that in *Saipan Stevedore Co. Inc. v. Director OWCP*, 133 F.3d 717, 722-23 (9th Cir. 1997), the Ninth Circuit observed that the Fifth Circuit's holding that the subsection 20(a) presumption "applies to jurisdictional issues" is "consistent with the concerns that led to passage of the Act."

Accordingly, I find that under the provisions of subsection 20(a) of the Longshore Act, there is a presumption that all of the injuries alleged by the claimant in his claim of May 25, 1997 (i.e., all the cumulative traumas that allegedly occurred between July 21, 1990 and January 7, 1997) are within the jurisdiction of the OCSLA. I further find that although the claimant's testimony that he believes he last worked on the outer continental shelf in 1995 *might* be sufficient to rebut a presumption that he sustained OCSLA injuries *after* 1995, it is not sufficient to rebut the presumption that he sustained OCSLA injuries during the period of time beginning in July of 1990 and ending in 1995. I thus find that OCSLA jurisdiction

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11. Significantly, the Administrative Law Judge's finding that the claimant had failed to prove that his claim came within the jurisdiction of the Longshore Act was partially based on the fact that the claimant bus driver could not recall whether he drove into the District of Columbia on the day of his injury.

existed during at least part of the period for which Signal Mutual provided coverage and that Signal Mutual is therefore liable for the payment of any benefits owed to the claimant by Pride.

4. Timeliness of the Back Injury Claim Against Pride

Under the provisions of subsection 13(a) of the Longshore Act, a claim for a work-related injury or death is barred unless the claim is filed within one year after the injury or death. However, this subsection also provides that the time for filing a claim shall not begin to run until the injured worker is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the worker's employment.

In this case, both Pride and Signal Mutual contend that even though the medical reports issued in 1998 by Dr. Strait (PCX 13) and Dr. Nagelberg (CX 1) both informed the claimant of a causal relationship between the aggravation of his back impairment and his employment by Pride, there is no evidence that the claimant ever filed any sort of claim against Pride for his alleged back injuries.[12] They thus argue that the provisions of section 13(a) bar the claimant from recovering any sort of wage loss compensation from them for the work-related aggravation of his back condition.

Review of the evidence indicates that, as alleged by Pride and Signal Mutual, the claimant should have been aware of the relationship between the aggravation of his back impairment and his employment when he was examined by Dr. Strait and Dr. Nagelberg in 1998. The evidence also indicates that in fact no formal claim for back injuries was ever filed against Pride and that the claimant apparently did not even notify Pride of any his intention to seek benefits for such injuries until May of 2001. Accordingly, I find that any claim against Pride for wage-loss compensation for aggravation of the claimant's back condition is now barred under the provisions of subsection 13(a) of the Longshore Act.[13]

In concluding that subsection 13(a) bars recovery of compensation from Pride for aggravation of the claimant's back impairment, consideration has been given to prior decisions holding that the limitations period of section 13 is tolled in cases where a claimant has mistakenly sought benefits for an alleged injury from some other employer that was ultimately found to not be the responsible employer. *See Smith v.*

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12. In this regard it is noted that sometimes even a medical report can constitute a claim if it is filed with the Office of Workers' Compensation Programs. However, there is no evidence that either the medical report of Dr. Strait or the report prepared by Dr. Nagelberg was ever filed with the Office of Workers' Compensation Programs.

13. However, because the provisions of subsection 13(a) do not apply to medical benefits, the claimant is not precluded from recovering from Pride the costs of any medical treatment for his back.

Aerojet-General Shipyards, 647 F.2d 518 (5th Cir. 1981); *Osmundsen v. Todd Pacific Shipyard*, 18 BRBS 112 (1986). However, such tolling can occur only when a claimant has filed a timely claim for the same injury against another employer. *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998). *See also Hill v. Director, OWCP*, 195 F.3d 790 (5th Cir. 1999). In this case, no such timely claim for the same injury has been filed against any other employer and therefore the limitations period of subsection 13(a) had not been tolled.[14]

Consideration has also been given to the assertions of the claimant's counsel that a claim against Pride for alleged back injuries has been filed under the workers' compensation laws of the State of California. For two reasons, however, this alleged state claim cannot be used to extend the one-year filing period prescribed in subsection 13(a). First, the record does not contain any evidence showing the date that this state claim was filed or even the contents of the claim. Second, even though the provisions of subsection 13(d) of the Act do provide that the subsection 13(a) filing period can be extended in certain circumstances, the mere filing of a state workers' compensation claim is not one of these circumstances. *See Bath Iron Works v. Director, OWCP*, 125 F.3d 18, 23-24 (1st Cir. 1997). It is noted that the Fifth Circuit has reached a different conclusion on this question. *Ingalls Shipbuilding Division, Litton Systems, Inc. v. Hollinhead*, 571 F.2d 272 (5th Cir. 1978). However, as the First Circuit pointed out in its *Bath Iron Works* decision, that conclusion is inconsistent with the plain language of subsection 13(d).

5. Timeliness of Notice of Injury to Pride

Subsection 12(a) of the Act provides, *inter alia*, that a claimant must give an employer notice of a compensable work-related injury within 30 days of the injury or within 30 days after the employee is aware of a relationship between the injury and the employment unless the claimant's injury is an "occupational disease which does not immediately result in disability or death," in which case notice must be given within one year after the claimant becomes aware of the relationship between the employment, the disease, and the death or disability. However, subsection 12(d)(2) provides that failure to give timely notice shall not be a bar to the recovery of benefits if the responsible employer or carrier was not prejudiced by the claimant's failure to provide notice in a timely fashion. Moreover, under the provisions of subsection 20(b) of the Act, there is a presumption that the employer was not prejudiced by lack of timely notice and this presumption can be overcome only if the employer produces substantial evidence to the contrary. *See Kashuba v. Legion Insurance Co.*, 139 F.3d 1273, 1275 (9th Cir. 1998); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233, 240 (1990). In addition, section 35 of the Act provides that "notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier."

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14. It is recognized in this regard that in 1991 the claimant did file a back injury claim against Pool. PCX 2 at 6. However, that claim pertained only to a single traumatic injury that occurred on July 20, 1990 and did not allege the kind of cumulative trauma that is the basis for the allegations against Pride.

In this case, Pride and Signal Mutual both argue that because the claimant's work activities at Pride increased his hip pain, in the exercise of reasonable diligence he should have known of the relationship between his employment and his hip impairment no later than January 1997 and that he therefore should have given Pride notice of his hip injury by February of 1997. These parties further argue that because they did not receive earlier notice of the injury, they were unable to conduct a timely investigation of the hip injury claim and were thereby prejudiced in their attempts to defend against the claim. To support this argument Signal Mutual presented the testimony of Ed Martin, who was assigned responsibility for investigating the hip injury claim by Signal Mutual in November of 1999. Tr. at 445-46. In brief, Mr. Martin testified that, in his opinion, Pride and Signal Mutual were prejudiced by their failure to receive notice of the claimant's hip and back injuries prior to February of 1997. Tr. at 448. For example, he testified, the failure to receive notice by that date prevented him from interviewing co-workers to see if the claims were compensable, arranging for an independent medical examination, and being involved in the treatment of the claimant's hip condition. Tr. at 447-49. Mr. Martin also testified that he attempted to investigate the claimant's hip and back impairments after receiving notice of the claim from Signal Mutual in November of 1999, but by that time could no longer locate records or people who could recall details of the claimant's work on the outer continental shelf. Tr. at 449-50.

For two reasons, I find that the foregoing evidence does not provide an adequate basis for finding that section 12 bars the claimant from recovering benefits for his hip impairment from Pride or Signal Mutual.[15]

First, Pride and Signal Mutual are unconvincing in arguing that in the exercise of reasonable diligence the claimant should have known by January of 1997 that there was a relationship between his work for Pride and his hip impairment. In this regard, it is noted that although the claimant had suspected since 1991 that there was a relationship between his hip condition and his July 20, 1990 injury while working for Pool, there is insufficient evidence in the record to indicate that the claimant should have known at any time before filing his May 25, 1997 claim that his hip impairment had been aggravated or accelerated as a result of his employment by Pride. Indeed, it was not until Dr. Nagelberg's examination of the claimant on April 17, 1998**,** that *any* physician had opined that such a relationship existed. CX 1 (report of Dr. Nagelberg). Moreover, it would be unreasonable to conclude that the claimant, who is neither a lawyer nor a doctor, should have known that the worsening of his hip pain provided him a sufficient basis for making a claim that he had suffered a work-related injury while working for Pride. Hence, it is concluded that there is insufficient evidence in the record to warrant a finding that the notice indirectly given by the claimant's May 25, 1997 claim was filed more than 30 days after the claimant was aware or should have been aware of the relationship between his hip injury and his employment.

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15. Because it has been determined that the claim for back injuries is barred under the provisions of subsection 13(a), it is unnecessary to determine whether that claim is also barred under the provisions of section 12.

Second, even if it could be concluded that the claimant did not provide notice of his hip injury within the 30-day period allowed by section 12, Pride and Signal Mutual have failed to present evidence that is sufficient to warrant a conclusion that they were prejudiced by the delay. In this regard it is noted that although subsection 12(d) does not specify the type of showing that a defendant must make in order to establish that it was prejudiced by a failure to receive timely notice, helpful guidance can be found in the Ninth Circuit's *Kashuba* decision. In that decision, the court noted that three purposes are served by the notice requirement: "effective investigations, providing effective medical services, and preventing fraudulent claims." 139 F.3d at 1276. Thus, the court held that evidence "that lack of timely notice did impede the employer's ability to determine the nature and extent of the injury or illness or to provide medical services" is sufficient to meet the employer's burden.[16] 139 F.3d at 1276. In this case, however, the evidence provided by Mr. Martin is insufficient to make such a showing. For example, even though Mr. Martin undoubtedly had difficulty locating records and finding people who could recall the details of the claimant's work on the outer continental shelf, there has been no showing that these same problems would not have been encountered if Mr. Martin had been given his assignment when the claim was sent to Pride in June of 1997. Indeed, it appears that all or almost all of the difficulties encountered by Mr. Martin were attributable to the fact that he was not asked to investigate the claim in this case until November of 1999, i.e., until almost **two and one-half years** after Pride received notice of the claimant's hip injury.[17] Likewise, although it is theoretically possible for an employer to show that an injured worker's failure to provide timely notice denied the employer an opportunity to provide medical care that could have achieved a better result than was achieved in the absence of proper notice, there is no such evidence in this case. In fact, the weight of the evidence indicates that the claimant achieved an excellent result from the hip replacement surgeries performed by Dr. Golden. Finally, unlike the situation described in the *Kashuba*

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16. *See also* A. Larson, *Larson's Workers' Compensation Law* §78.32 (1999)(observing that proof of lack of prejudice usually follows the pattern set by the two objectives of the notice statute: first a showing that the claimant's injury was not aggravated by reason of the employer's inability to provide early diagnosis and treatment; and second, a showing that the employer was not hampered in making its investigation and preparing its case).

17. In this regard, it is recognized that it is entirely possible that Signal Mutual might have been prejudiced by the fact that it did not receive notice of the May 1997 claim until more than two years after the claim was sent to Pride. However, there is no basis for finding that Pride's failure to promptly notify Signal Mutual of the claim in any way relieves Signal Mutual of its obligation to pay benefits to the claimant. Nor is there any basis for finding that the claimant had any independent obligation to notify Signal Mutual of his claim. Indeed, under the provisions of section 35 of the Act Signal Mutual must be deemed to have received notice of the injury at the same time as Pride did, i.e., in June of 1997, when the Office of Workers' Compensation Programs sent a copy of the claimant's May 25, 1997 claim to Pride.

decision, there is no evidence in this case that in any way suggests that a timely notice of injury could have somehow helped the defendants rebut a potentially fraudulent claim.[18]

6. Date of Maximum Medical Improvement

A disability is considered permanent as of the date a claimant's condition reaches the point of maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984); *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988). The issue of whether a claimant's condition has reached the point of maximum medical improvement is primarily a question of fact and must be resolved on the basis of medical rather than economic evidence. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200 (1987). However, a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub. nom Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

In this case, the claimant contends that his hip condition did not reach the point of maximum medical improvement until April 17, 1998. Tr. at 81. His primary support for this contention is the April 17, 1998 report of Dr. Nagelberg. In contrast, all the defendants assert that the claimant's hip condition became permanent and stationary on August 14, 1997. Tr. at 83-84. This position is apparently based on opinions from Dr. Strait and Dr. Heskiaoff indicating that the claimant's hip condition became permanent and stationary six months after the claimant's second hip surgery, which occurred on February 13, 1997.[19] SMX 7 (report of Dr. Strait), SMX 10 (report of Dr. Heskiaoff). Dr. London is the only other physician who has provided evidence concerning the date that the claimant's hip condition reached the point of maximum medical improvement. According to Dr. London's report of December 2, 1997, the claimant's

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18. It is also noted that the *Kashuba* decision points out that mere conclusory allegations of prejudice are not sufficient to establish prejudice under section 12. 139 F.3d at 1276. *See also ITO Corporation v. Director, OWCP*, 883 F.2d 422, 424 (5th Cir. 1989)(holding that generalized assertions that an employer was prejudiced because it had no opportunity to investigate a claim when it was fresh are not sufficient to show prejudice).

19. During the trial, the counsel for the defendants mistakenly attributed this opinion to Dr. London. Tr. at 83-84.

hip condition was permanent and stationary by the time of Dr. London's November 10, 1997 examination. PCX 6 at 235-38.

Although the reports of Dr. Nagelberg and Dr. London indicate that the claimant's hip condition had become permanent and stationary by the dates that they examined the claimant, these reports do not necessarily conflict with the opinions of the two physicians who have concluded that the claimant's condition reached the point of maximum medical improvement six months after his second hip surgery. Accordingly, I find that the claimant's hip condition became permanent and stationary on August 14, 1997.

7. Extent of Disability

Any claimant who contends that he is disabled has the burden of proving a *prima facie* case of disability by showing that he cannot return to his regular employment due to his work-related injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). If the claimant meets this burden, the employer must then establish the existence of specific and realistically available job opportunities within the geographic area where the employee resides which a person with the employee's technical and verbal skills is capable of performing. *See*, e.g., *Bumble Bee Seafoods, supra; Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). To satisfy this burden the employer must identify *specific* jobs that the claimant can perform and obtain. *Bumble Bee Seafoods, supra*, at 1330. In considering whether a claimant has the ability to perform particular work, a fact finder must consider the claimant's physical restrictions, technical abilities and verbal skills. In addition, a fact finder must also consider the likelihood that a person of the claimant's age, education, and background would be hired if he or she diligently sought the alternative job identified by the employer. *Hairston, supra*, at 1196; *Stevens v. Director, OWCP*, 909 F.2d 1256 at 1258 (9th Cir. 1990). If an employer makes the requisite showing of suitable alternative employment, a claimant may rebut the employer's showing by demonstrating that a diligent effort to obtain such work was unsuccessful. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993); *Palombo v. Director, OWCP*, 937 F.2d 70 (2nd Cir. 1991).

In this case, the claimant asserts that he is no longer capable of performing the type of work he did at Pool or Pride, but acknowledges that he could probably do a job that would allow him to take breaks and would not require him to sit for prolonged periods. SMX 18 at 378 (claimant's deposition testimony), Tr. at 132 (claimant's trial testimony). In addition, Signal Mutual concedes that the claimant cannot return to his former job. Tr. at 73-74. Hence, the only question to be resolved is the extent of the claimant's residual wage earning capacity.

In an attempt to show that suitable alternative employment is available to the claimant, Signal Mutual has submitted an April 4, 2001 report from Ed Bennett, a certified vocational rehabilitation counselor. SMX 17. In brief, Mr. Bennett's report concludes that the claimant would be a realistic and reasonable candidate for jobs selling oil rig supplies and that employment in such a job would enable him

to earn $665.87 per week. SMX 17 at 206, SMX 21 at 2. The claimant has not disputed this conclusion. Review of Mr. Bennett's report indicates that he found a number of Southern California employers who have hired oil rig supply sales representatives in the past two years and that on January 23, 2001 he identified one such sales position was that was still open. Because the report did not contain details describing exactly when the other sales jobs had been open, the job that was still open on January 23, 2001 will be used for determining the date that suitable alternative employment became available to the claimant. I thus find that as of January 23, 2001, the claimant had a residual wage earning capacity of $665.87 per week.

In calculating a claimant's entitlement to unscheduled disability benefits, the claimant's current earning capacity must be adjusted to account for any wage inflation between the date of his or her work injury and the date that suitable alternative employment became available. *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 321 (D.C. Cir. 1986). Ordinarily, this adjustment should be made by determining the wage level that prevailed for the alternative employment at the time of the claimant's work-related injury. However, no such evidence is contained in this record. Accordingly, the necessary adjustment must be made by decreasing the claimant's current residual wage earning capacity by an amount proportionate to the increase in the National Average Weekly Wage (NAWW) since the date of the claimant's work injury. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Data published by the Department of Labor show that the NAWW increased from $400.53 on October 1, 1996, to $466.91 on October 1, 2000. Therefore, when adjusted to reflect the changes in the NAWW, the claimant's residual weekly wage earning capacity of $665.87 was equivalent to a weekly wage of $571.20 in January of 1997. The claimant's loss of wage earning capacity is thus $444.18 per week (his stipulated average weekly wage of $1,015.38 minus $571.20). Therefore, on January 23, 2001 the claimant's entitlement to total disability benefits ended and under the provisions of subsection 8(c)(21) of the Act he became entitled to permanent partial disability benefits equal to two-thirds of $444.18, i.e., $296.12 per week.

8. Pride's Entitlement to a Credit for Wages the Claimant Received after His Last Day of Work for Pride

As previously noted, even though the claimant did not do any work for Pride after January 7, 1997, Pride continued to pay him wages until April 11, 1997. PRX 23 at 233. Signal Mutual thus contends that it should be given a credit for the amounts paid in wages between January 7 and April 11, 1997.

No party has cited any Longshore Act precedents for allowing such a credit and it appears that this subject has not been considered in any prior Longshore Act litigation. According to the leading treatise on workers' compensation law, a credit can be allowed for wage payments made to an injured worker if the evidence indicates that the payments were intended to be in lieu of workers' compensation benefits. A. Larson, *The Law of Workers' Compensation* §82.01 (2000). However, this treatise also indicates

that requests for credit are usually denied when the wage payments to an injured worker were for accrued "sick" or "vacation" leave. *Id.* at §82.06[3].

In this case, there is no reason to believe that the payments made to the claimant between January and April of 1997 were intended to be in lieu of compensation. Indeed, Pride did not have any reason to believe that the claimant's hip impairment was work related until June of 1997. Accordingly, it appears that these payments were actually accrued sick and vacation pay. Thus, no credit can be awarded for these payments.

9. Pride's Entitlement to Special Fund Relief

In order to obtain relief from the Special Fund under subsection 8(f) of the Act, an employer must show: (1) that the claimant had a permanent partial disability prior to his work-related injury, (2) that the pre-existing disability was manifest prior to that injury, and (3) that the pre-existing disability contributed to the claimant's ultimate permanent disability in the specific manner prescribed in the Act. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982). In this case, the Director concedes that the first two requirements have been met, but has failed to state any position on the question of whether the third requirement has also been satisfied. PRX 10.

In brief, the third requirement for obtaining subsection 8(f) relief has two elements. First, it must be shown that the claimant's ultimate disability is not due solely to the subsequent injury, regardless of whether the ultimate permanent disability is either partial or total. *See* 20 C.F.R. §702.321(a)(1)(iv). In interpreting this requirement, the courts have held that even if a claimant's pre-existing disability combined with a work-related injury to create a greater disability than the work-related injury would have caused by itself, subsection 8(f) relief is still precluded if the work-related injury alone would have been totally disabling. *See FMC Corp. v. Director, OWCP*, 886 F.2d 1185 (9th Cir. 1989); *Director, OWCP v. Luccitelli*, 964 F.2d 1303 (2nd Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748 (5th Cir. 1990). Second, when an ultimate permanent disability is only partial rather than total, the employer must also establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. *See* 20 C.F.R. §702.321(a)(1).

In an attempt to show that these requirements have been satisfied, Pride and Signal Mutual rely on the reports and testimony of Dr. London and Dr. Heskiaoff and on the reports of Dr. Nagelberg and Dr. Strait. PCX 21 (testimony of Dr. London), SMX 22 at 37-38 (testimony of Dr. Heskiaoff), SMX 10 (report of Dr. Heskiaoff), PRX 9 at 35 (report of Dr. London) SMX 9 at 73 (report of Dr. Nagelberg), SMX 7 at 37 (report of Dr. Strait). I find that this evidence is more than sufficient to show that the contribution requirement has been met and therefore find that Pride is entitled to relief under subsection 8(f) of the Act.

10. Pride's Obligation to Reimburse Pool for the Costs of the Claimant's Back Surgery and Benefits

As previously explained, the weight of the evidence indicates that the claimant's back impairment was permanently aggravated during the period between his first employment by Pride in February of 1991 and the back surgery performed by Dr. Abou-Samra in June of 1991. Pool paid for the costs of this surgery and also paid temporary total disability benefits to the claimant while he recuperated. Pool thus contends that Pride should reimburse it for the cost of the surgery and for the temporary disability benefits paid to the claimant.

There is no provision in the Longshore Act expressly requiring an employer who is responsible for a work-related injury to repay another employer who has mistakenly paid benefits for the injury. Hence, it is questionable whether there is any legal authority which would permit the issuance of order requiring Pride to reimburse Pool for the benefits it provided to the claimant. *See, e.g., Stevedoring Services of America v. Eggert*, 953 F.2d 552 (9th Cir. 1990) (holding because no provision of the Longshore Act expressly authorizes employers to recover mistakenly paid benefits from overpaid claimants, such recoveries are not permissible in proceedings under the Longshore Act). However, even if it were theoretically possible to issue such an order, it appears that in this case any reimbursement claim against Pride would be barred by the doctrine of laches. In this regard, it is noted that Pool should have been aware of Pride's potential liability for aggravating the claimant's back condition since at least April of 1991, but apparently did not make any effort to investigate this possibility or to obtain reimbursement from Pride until the year 2001. *See, e.g.*, PRX 22 at 216 (April 19, 1991 report of Dr. Abou-Samra indicating that the claimant was doing work at Pride that involved lifting). Moreover, it is obvious that much of the evidence that would be relevant to any defense by Pride has been lost during the past ten years. Accordingly, I find that Pool is not entitled to receive any sort of reimbursement from Pride. *See Gordon v. Metropolitan Stevedore*, 27 BRBS 397 (ALJ)(1993)(holding that although the doctrine of laches cannot be applied against a claimant, the doctrine can be invoked when one employer is dilatory in asserting a cross claim against another employer).

ORDER

1. Signal Mutual shall pay the claimant temporary total disability compensation for the period beginning on January 8, 1997 and ending on August 13, 1997 at a weekly compensation rate of $676.92 per week.

2. Signal Mutual shall pay the claimant permanent total disability compensation for 104 weeks from August 14, 1997 at a weekly compensation rate of $676.92.

3. Beginning 104 weeks from August 14, 1997 and until January 22, 2001, the Special Fund shall pay the claimant permanent total disability compensation of $676.92 per week.

4. Beginning on January 23, 2001 and until ordered otherwise, the Special Fund shall pay the claimant permanent partial disability compensation of $296.12 per week.

5. Signal Mutual and the Special Fund shall pay interest to the claimant on each unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. §1961.

6. The District Director shall make all calculations necessary to carry out this order.

7. Signal Mutual shall provide the claimant all medical care that may be reasonable and necessary for the treatment of the sequelae of his back and hip injuries.

8. Pride's request for credit for wage payments made to the claimant after January 7, 1997 is denied.

9. Pool's request for an order requiring Pride to reimburse it for previously-paid medical and wage loss benefits is denied.

10. Counsel for the claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for Signal Mutual within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, counsel for the Signal Mutual shall initiate a verbal discussion with counsel for the claimant in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel thereby agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, counsel for the claimant shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the counsel for Signal Mutual with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the counsel for the Signal Mutual and shall set forth therein the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for Signal Mutual shall file a Statement of Final Objections and serve a copy on counsel for the claimant. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

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Paul A. Mapes
Administrative Law Judge